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IN THE

Supreme Court of the United States

No. 959 OCTOBER TERM, 1966

EMILIO ALBERGO, Petitioner,

v.

READING COMPANY, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Third Circuit, and the dissenting opinion (App. B of Petition) are unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was not the Court of Appeals correct in entering judgment notwithstanding the verdict when the evidence was plainly insufficient to support, with reason, either the conclusion that the respondent was negligent or the conclusion that such negligence played some part in petitioner's injury?

2. Is not the doctrine of *res ipsa loquitur* inapplicable when there was no evidence that the injury was such as would not occur in the absence of negligence by respondent; there was no evidence that the possible causes of the injury were under respondent's exclusive control; and petitioner failed to raise this question either in the district court or in the court of appeals?

STATEMENT

This brief relates to an action under the Federal Employers' Liability Act which involves two independent causes of action. The first is based upon an accident which occurred on July 16, 1958 (R.4-6); the second upon an accident which occurred on November 17, 1961 (R.7-8). We are concerned here with the first claim only.

On July 16, 1958, petitioner, an employee of respondent railroad, was injured while standing next to a gondola car, when a metal band used to secure cargo on the car snapped and struck him. The jury returned a verdict for petitioner and judgment was entered thereon. Respondent moved for a new trial on the grounds that the trial court had unduly restricted its cross-examination and evidence on damages, and also moved for judgment notwithstanding the verdict on the grounds that the evidence was insufficient to support, with reason, the conclusion that any negligence of respondent played any part in petitioner's injury. Both motions were denied.

Petitioner's theory of respondent's negligence urged at the trial was predicated upon the existence of notice on the part of respondent of an unsafe condition caused by the snapping of the metal bands (R. 8, 10, 11, 49). However, the testimony of petitioner's witnesses at the trial, with one exception, indicated only that they had seen broken straps hanging from the sides of cars (R. 13, 30-37), not that they had seen the straps snap. The only testimony of

straps actually snapping was devoid of any description of the surrounding circumstances and was completely lacking in probative value (R. 35).

The Court of Appeals, viewing the evidence in the light most favorable to the petitioner, found that the evidence was not sufficient to warrant submission of the question to the jury, since petitioner's proofs established nothing more than that he was injured as a result of an accident (Pet. App. 4a). The question of whether the trial court erred in refusing respondent's motion for a new trial on petitioner's first claim was discussed by only one judge of the appellate court, who, in an opinion which concurred in part and dissented in part, found that the trial judge had unduly restricted respondent's cross-examination and evidence on damages to such an extent that it constituted reversible error requiring a new trial (Pet. App. 6a). The majority did not consider the question of a new trial on the first claim, having reached the conclusion that respondent was entitled to judgment notwithstanding the verdict. (Pet. App. 2a-5a)

ARGUMENT

The Court of Appeals for the Third Circuit, after hearing argument and a careful review of this record, viewing the evidence in the light most favorable to the petitioner, found that petitioner had failed to present evidence upon which the jury could, with reason, find that any negligence on the part of respondent played any part in petitioner's injury. This decision is clearly justified on the record and is consistent with the decisions of this Court, meticulously cited as authority by the Court of Appeals, defining the function of an appellate court in Federal Employers' Liability Act cases.

Petitioner's reliance on the doctrine of *res ipsa loquitur* cannot serve to correct the absence of proof in this record since petitioner failed to urge this theory in the lower

courts. Nor does the doctrine apply to the facts in this case, since there was no evidence that the accident was one which would not occur in the absence of respondent's negligence.

The instant case is not one which meets the criteria that define those "special and important reasons" necessitating the granting of a writ of certiorari. The question here presented merely involves the fair assessment of the record by the Court of Appeals on the issue of unsubstantiality of the evidence, and is not of general importance since the decision below turns on the peculiar facts of this case and the barrenness of the record presented.

I. No Absolute Right to a Jury Determination Exists in Federal Employers' Liability Act Cases.

A case based on the Federal Employers' Liability Act can not be submitted to a jury unless plaintiff has met his burden of producing probative facts from which the jury could with reason infer both negligence and that such negligence played some part in his injury. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500. In *Rogers*, this Court reversed the decision of a state court and held that the evidence was sufficient to support a jury finding in plaintiff's favor. However, in describing the test for submission of a Federal Employers' Liability Act case to a jury, this Court used the following words (pp. 506-07):

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

This quotation indicates that where there is evidence from which a jury could *with reason* conclude that the

negligence of the defendant contributed in whole or in part to the plaintiff's injury, the issue is for the jury to determine; the case does not, however, hold that every case must be submitted to the jury, even in the absence of evidence of negligence from which a jury could reach such a conclusion with reason.

At the same time, in *Herdman* v. *Pennsylvania R. Co.*, 352 U.S. 518, this Court held that no jury question of negligence was presented by the proofs, and the decision of the Court of Appeals, which had affirmed a judgment on a directed verdict in favor of the defendants, was affirmed. In that case, petitioner, a conductor in charge of a train, brought an action for injuries allegedly suffered from a fall occurring when the train suddenly stopped. Plaintiff presented evidence which indicated that the train had been stopped by the engineman in an emergency to prevent striking an automobile. There was no evidence that the stop was made with any unusual or special severity and no evidence to prove that unscheduled or sudden stops of trains are unusual or extraordinary occurrences. The Court held that the evidence did not warrant the inference that the defendant was negligent.

Likewise, the Court in the *Rogers* case referred to a number of earlier cases in which this Court had found that no question for the jury was presented: *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573; *Eckenrode* v. *Pennsylvania R. Co.*, 335 U.S. 329; *Brady* v. *Southern R. Co.*, 320 U.S. 476. Since *Rogers*, this Court has continued to require that the evidence be sufficient to present a jury question, *New York, New Haven & Hartford Railroad Co.* v. *Henagan*, 364 U.S. 441.

It is clear, therefore, that the evidence must be sufficient to support, with reason, the conclusion that the employer was negligent and that such negligence played some part in the injury. In the absence of such evidence, no question is presented for determination by the jury.

II. Petitioner Failed to Produce Any Evidence of Negligence on the Part of Respondent in Connection with His 1958 Accident and the Evidence Established Only That the Band Snapped and Struck Him.

(1) The fact of an injury alone does not constitute evidence of negligence;

(2) There was no evidence as to what caused the band to snap;

(3) There was no evidence that any conduct on the part of respondent caused the band to snap;

(4) There was no evidence that the band was in any way defective;

(5) There was no evidence that respondent knew or had reason to know that the band would snap and create an unsafe place to work.

Petitioner contended at the trial and before the Court of Appeals that he was entitled to recover under the Federal Employers' Liability Act with respect to his 1958 accident because respondent was on notice prior to the accident that these bands were likely to break (R. 8, 10, 11, 49).

This contention finds no support in the record. On the contrary, petitioner testified merely that as he was standing near the subject car the bands broke loose and struck him (R. 8, 9, 10). With respect to petitioner's contention that respondent was on notice that the bands had snapped under similar circumstances before, petitioner's testimony only establishes that he had seen gondola cars with straps hanging down quite often prior to July of 1958. In no way does the testimony relate them to a band suddenly breaking and swinging over the side (R. 13, 14).

The testimony elicited from petitioner's witnesses concerning the 1958 accident is to exactly the same effect and

was no more probative concerning the manner or cause of the subject accident than the testimony offered by petitioner himself. There is no evidence to support petitioner's argument that the bands they had seen before were hanging because they had snapped or broken while applied to loaded cars, such as occurred at the time of petitioner's injury. Neither petitioner nor any of his witnesses testified that they had ever seen a band break before on a loaded car. Rather, the testimony clearly demonstrates that they had only seen bands hanging from cars but they were unable to say whether the bands had broken or had been cut by the consignee and left extending from the car (R. 30-37). Mr. McGinley was the only witness who said that he had ever seen bands break before but his testimony is barren of any evidence concerning under what circumstances such breaking might have occurred, not even whether the bands he saw break were on loaded or unloaded cars. He specifically stated that his only personal experience involved a band which had been cut and was sticking out from an empty car as it went by him (R. 35-36).

Closely analogous to the instant case on the question of notice is the case of *Inman* v. *Baltimore and Ohio R. Co.*, 361 U.S. 138. In that case petitioner was injured by a drunken driver at a crossing where he was flagging traffic for a passing train. The petitioner contended that the railroad was negligent because it failed to afford enough protection. The judgment for petitioner was reversed by the state appellate court and this Court affirmed. After noting that there was no evidence of similar accidents at the crossing, this Court said (pp. 140-41):

> "The contention of petitioner is that the witness' remark, 'like a lot of them I seen there, jumping the gun,' was testimony of other occurrences at the crossing similar to the one here involved. The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony

showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record. In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these 11 words of the witness can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

Similarly in the instant case the United States Court of Appeals for the Third Circuit found that evidence of similar occurrences in the past was lacking. The testimony of the one witness referred to above that in his eighteen years of experience with the railroad he had seen bands break at least twice, with no evidence of the surrounding circumstances, is completely lacking in probative value. Such testimony does not even constitute a slender reed; it has no weight at all.

Lacking any evidence of similar occurrences in the past upon which notice to respondent might be predicated, petitioner contends that the United States Court of Appeals for the Third Circuit ignored respondent's duty to inspect the gondola car in question. The record, however, is devoid of any evidence that respondent failed to inspect the car in question. Petitioner further contends that respondent's duty to inspect implies constructive notice of any unsafe conditions. But such constructive notice arises only if the defect is discoverable upon reasonable inspection. *Baltimore and Potomac R. Co.* v. *Mackey,* 157 U.S. 72. Petitioner in the instant case presented no evidence that the metal band was defective. Nor, even assuming the band was defective, was there any evidence that the defect was discoverable upon reasonable inspection.

Petitioner's reliance on the case of *Shenker* v. *Baltimore and Ohio R. Co.*, 374 U.S. 1, and cases of similar import is misplaced. In *Shenker*, the defect—a sliding door which would only open partially—was discoverable upon even a cursory inspection. So also, in *Dudley* v. *Scandrett*, 115 F. 2d 728 (9th Cir. 1940), the injury was caused by a sharp edge on a smokejack being shipped as cargo, a readily discoverable condition.

Nor was there any evidence that any conduct on the part of respondent caused the subject band to snap. On the contrary, the only evidence on that point came from petitioner's witness Horan who testified that "the coupling was made easy—it wasn't made hard, it wasn't what you would call a hard coupling" (R. 31).

Petitioner in this case presented evidence only of the fact that a two-inch metal band broke and that this accident resulted in an injury. Petitioner's contention that such evidence presents a factual issue for the jury presupposes that the Federal Employers' Liability Act makes respondent an insurer of its employees' safety. This court has clearly held that the Act has no such effect. *Inman* v. *Baltimore and Ohio R. Co.*, 361 U.S. 138.

III. The Doctrine of Res Ipsa Loquitur Is Not Applicable in this Case.

Petitioner seeks to correct the evidentiary defects in this record by a belated reliance on the doctrine of *res ipsa loquitur*. Petitioner contends that the Court of Appeals for the Third Circuit *denied* him the application of the doctrine. How could petitioner have been denied that for which he never asked? At no time prior to his petition for a writ of certiorari, in the pleadings, during the pretrial, trial, and post trial proceedings, or on appeal has petitioner relied on the doctrine. The record is clear that petitioner sought to show actual or constructive notice of some defect in the metal band which snapped and, as the

Court of Appeals for the Third Circuit found, he failed to prove the existence of either a defect or notice. If there had ever been an inkling that *res ipsa loquitur* would be urged, the respondent would have been entitled to offer evidence to prove that the operative facts which give rise to the inference were absent in this case. The injustice of allowing petitioner to rely on the doctrine at this late date, since it deprives respondent of his right to offer rebuttal evidence, is manifest.

The general rule that an appellate court will not consider questions not raised and passed upon in the lower court is founded on considerations of practical necessity, elementary fairness, and the orderly administration of the law. Petitioner would have this Court reverse the considered decision of the Court of Appeals for the Third Circuit on grounds which petitioner did not urge before that court. As this Court noted in *Robinson & Co.* v. *Belt*, 187 U.S. 41, 50:

> "While it is the duty of this court to review the action of subordinate courts, justice to these courts requires that their alleged errors should be called directly to their attention, and that their actions should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

Furthermore, the reasons which militate against allowing a litigant to switch his theory on appeal become more compelling as the litigation proceeds to advanced stages. In re *Linda Coal and Supply Company*, 255 F. 2d 653 (3rd Cir. 1958).

Numerous appellate courts which have considered the question of whether the doctrine of *res ipsa loquitur* can be relied upon on appeal when not urged in the lower court have decided it cannot. *Broderick* v. *City of Waterbury*, 130

Conn. 601, 36 A. 2d 585 (1944); *Atlantic Coast Line Railroad Co.* v. *Columbia Salvage Corp.*, 138 S.C. 113, 135 S.E. 877 (1926); *Flader* v. *Simonsen*, 148 Colo. 480, 366 P.2d 678 (1961); *Kerby* v. *Chicago Motor Coach Co.*, 28 Ill. App. 2d 259, 171 N.E. 2d 412 (1960). In *Fassbinder* v. *Pennsylvania Railroad Company*, 322 F.2d 859 (3rd Cir. 1963), the plaintiff's failure to assert in terms his reliance on the doctrine was held of no consequence. However, in that case the court relied upon the fact that it was undisputed that the injury was caused by defective equipment of the railroad and the defendant therefore had clear notice that it was faced with a *res ipsa loquitur* situation. Not only was there no undisputed defect in the instant case, but petitioner also presented no evidence whatsoever that the metal band was defective, and respondent therefore had no notice that the applicability of the doctrine might be an issue.

Even assuming that petitioner's failure in this regard is not fatal, his reliance on the doctrine is entirely misplaced. In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, this Court defined the operative conditions necessary for the application of the doctrine (pp. 98-99):

> "[W]hen a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence in the absence of an explanation, that the injury arose from defendant's want of care."

There was no evidence in the instant case that this injury was one which ordinarily would not occur if respondent used proper care. Nor can this conclusion be based on the nature of the accident alone. Such a conclusion might flow naturally from a derailment, *Jesionow-*

ski v. *Boston & Maine R. Co.*, 329 U.S. 452, or from the falling of a block being held by a co-worker, *Johnson* v. *United States*, 333 U.S. 46, because experience indicates that the operations involved in these cases are ordinarily safe if the one performing the operation exercises due care.

Nor was there evidence that respondent had exclusive control of the operative factors which might have had a casual connection with the accident. There was no evidence that respondent selected, purchased or stocked the bands, as in *O'Neill* v. *Baltimore and Ohio R. Co.*, 348 U.S. 956, or that respondent loaded the gondola car, or that respondent attached the bands to the car, or even that the respondent had title to the car or its cargo. The evidence showed only that respondent had possession of the car itself at the instant of the injury. Without evidence that respondent had exclusive control of the operative factors that might have caused the band to snap, no inference of negligence arises. *Jesionowski* v. *Boston & Maine R. Co.*, 329 U.S. 452.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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